

duties because access to the stream of communications is nearly a fundamental right.<sup>215/</sup>

Close parallels may be found in all three of the essential jurisprudential elements when comparing media participation and school desegregation: (1) the goals; (2) the scope of its implementation, and (3) the enforcement duty of government. We discuss below each of these elements of media participation and analogize them to school desegregation jurisprudence.

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<sup>215/</sup> Access to the stream of mass communications has not yet been held to be a "fundamental" right. Cox v. Louisiana, 379 U.S. 536 (1965), although, like education, it is close to fundamental. Red Lion, 395 U.S. at 389. The near-fundamental nature of access to the stream of mass communications is evident from, e.g., Section 307(b) of the Communications Act, which requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same", and Section 331(a) of the Communications Act, which requires the Commission to allocate commercial VHF channels "in a manner which ensures that no less than one such channel shall be allocated to each State, if technically feasible."

It is inevitable that as we continue to evolve from an industrial to an information society, Congress or the Courts will declare that both education and access to the stream of mass communications are fundamental rights. We have already seen some of this legal evolution in Turner I. In Turner I, the Court applied intermediate scrutiny when it found that the cable must-carry rules were not content-based. Those rules, e.g., specifically favor "noncommercial educational broadcasting." Id., 512 U.S. at 631-32 (quoting Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§534-535 (Supp. IV 1992); the language is in 47 U.S.C. 535(a)). The 1992 Cable Act states that one purpose for requiring cable carriage of local broadcasts is that "public television provides educational and informational programming" and local broadcast "provides public service programming that is responsive to the needs and interests of the local community." 47 U.S.C. §§521(a)(8)(A), (B) (1992).

However, even under the current state of the law, the Commission, as the expert agency and as the guardian of the limited and valuable broadcast spectrum resource, must recognize that access to the stream of communications is so close to fundamental that denial of such access violates the Due Process Clause of the Fifth Amendment.

1. Goals. The primary goal of school desegregation is to promote equal protection and due process. Brown I, 347 U.S. at 492; Bolling, 347 U.S. at 501. Enhancing this goal is the pursuit of intellectual intercourse, a close analog to the free flow of ideas promoted by the First Amendment, which fosters a student's intellectual, cultural and civic or political development.<sup>216/</sup>

The Media Participation Right flows from essentially the same set of rights. A child's intellectual, cultural and civic or political development, as well as her overall socialization derives at least as much from the enjoyment of media as it does from the enjoyment of education.<sup>217/</sup>

2. Scope of Enforcement. A school desegregation decree is macroscopically directed at school systems rather than at individual children.<sup>218/</sup> Such a decree will seldom guarantee a child a place in any particular school.<sup>219/</sup> However, a school desegregation decree does guarantee that the school system will be configured, to the extent possible, to remove the effects of de jure or de facto racial barriers in the allocation of pupils to schools, the expertise of the teachers they encounter, the quality of the school buildings they attend and the equipment they use, and the public budgets supporting their school careers.<sup>220/</sup>

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<sup>216/</sup> Sweatt v. Painter, 339 U.S. 629 (1950) ("Sweatt") (holding that in order to educate a law student, a state must permit him to sit in a classroom and engage in dialogue with other law students of different backgrounds).

<sup>217/</sup> See Children's Television Act Senate Report.

<sup>218/</sup> See Green v. County School Board of New Kent County, 391 U.S. 430 (1968) ("Green").

<sup>219/</sup> Id. at 442.

<sup>220/</sup> Id. at 437-38.

Compliance must be robust.<sup>221/</sup> Compliance is the school system's responsibility, not the responsibility of the parents and students.<sup>222/</sup>

Similarly, a rule implementing the Media Participation Right would seldom guarantee any individual broadcast professional a job,<sup>223/</sup> nor would it guarantee any particular broadcast listener or viewer a choice of particular licensees of stations.<sup>224/</sup> Instead, such a rule would, to the extent possible, mediate the ownership structure or employment policies of the industry so as to enhance the likelihood that members of communities with common and identifiable interests, such as minorities and women, will enjoy, to the greatest extent possible, the same opportunities to create, transmit and respond to content as is enjoyed by others. Compliance must be robust.<sup>225/</sup> Compliance is the broadcaster's responsibility, not the responsibility of the minority or female broadcast professional or consumer.<sup>226/</sup>

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<sup>221/</sup> "The only school desegregation plan that meets constitutional standards is one that works." U.S. v. Jefferson County Board of Education, 372 F.2d 836, 847 (5th Cir. 1966) (opinion by Judge John Minor Wisdom), aff'd en banc, 380 F.2d 385 (5th Cir. 1967), cert denied, 389 U.S. 840 (1967).

<sup>222/</sup> See Green, 371 U.S. at 430 (rejecting "freedom of choice" plan which, on its face, transferred responsibility for desegregation from the school board to the parents and children).

<sup>223/</sup> FCC/EEOC Agreement, 70 FCC2d at 2331-32.

<sup>224/</sup> See Waters, 91 FCC2d at 1265.

<sup>225/</sup> For example, it would be unacceptable for a broadcaster to restrict minorities and women to jobs as secretaries or janitors, where they have little chance to affect the creation and transmission of content. See Rust/HDO, 53 FCC2d at 355.

<sup>226/</sup> The absence of minority or female applicants, or the alleged lack of assistance from referral sources, does not absolve a broadcaster of its obligation to take affirmative steps to recruit minorities and women. BBC, 556 F.2d at 63.

3. Duty to Enforce. School desegregation is compulsory rather than discretionary.<sup>227/</sup> A government may not decline to desegregate its schools if it had any material involvement in promoting segregation.<sup>228/</sup> However, if state action profoundly exacerbated school segregation, the government has an absolute duty to eliminate the present effects of its own actions.<sup>229/</sup> Obviously, the remedial decree may not itself exacerbate de facto segregation.<sup>230/</sup>

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<sup>227/</sup> See Fordice, 505 U.S. at 729 (holding that a state has an affirmative obligation to eliminate all vestiges of a previously segregated educational system; that obligation is not satisfied by mere adoption of race-neutral policies). The principle that remedial steps are compulsory, rather than discretionary, is well established in equal protection jurisprudence. See Louisiana v. U.S., 380 U.S. 145, 154 (1965) (declaring that a federal district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

<sup>228/</sup> Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973) ("Keyes"). Justice Brennan's majority opinion in Keyes declared that proof of intentionally segregative school board actions as to each individual school was unnecessary because the effects of segregation on one school would inevitably spill over onto other schools.

<sup>229/</sup> Gilmore v. City of Montgomery, Alabama, 417 U.S. 456 (1974) (a dual school system perpetuated by state action is unlawful). See also U.S. v. Yonkers Board of Education, 624 F.Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988) (finding that municipality's construction of de facto segregated public housing with race-based siting rendered the municipality's supposedly race-neutral "neighborhood schools" policy inherently discriminatory).

<sup>230/</sup> Swann v. Charlotte-Mecklenburg Board of Education, 334 F.Supp. 623 (1971) (finding that a supposedly remedial plan would have caused a return to de facto segregation).

Moreover, the government must enforce school desegregation decrees aggressively. Token<sup>231/</sup> or belated<sup>232/</sup> enforcement is impermissible. Similarly, the FCC may not decline to enforce due process or equal protection rights in the media. To the greatest extent possible, the FCC must eliminate irrational and artificial barriers to the full integration of the media since it has had material involvement in erecting and sustaining those barriers.<sup>233/</sup> Thus, given that the FCC's actions dramatically assisted discriminators in irrationally and artificially maintaining barriers to integration, the Commission has an absolute duty to eliminate the present effects of its own actions.<sup>234/</sup> Obviously,

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<sup>231/</sup> Fordice, 505 U.S. at 729 (holding that a state must eliminate all vestiges of previous segregation is not satisfied by mere adoption of race-neutral policies); Sweatt, 339 U.S. at 629 (allowing a law student to sit in a classroom without an opportunity to engage in dialogue with other students does not provide meaningful access to education).

<sup>232/</sup> Brown v. Board of Education, 349 U.S. 294, 299 (1955) ("Brown II") (requiring desegregation "with all deliberate speed" so that children currently enrolled in school may benefit); Griffin, 377 U.S. at 234 (declaring that the time for mere "deliberate speed" has run out).

<sup>233/</sup> Just as discrimination affecting one school invariably spills over and affects desegregation efforts at other schools (see Keyes, discussed at n. 228), discrimination at one broadcast station invariably spills over and affects minority and female opportunity at other stations -- such as those who would likely hire minorities and women who "graduate" from the discriminator to larger facilities as they continue their careers. Furthermore, as the NPRM recognized, the impact of EEO policy invariably affects ownership opportunities as well. Id., 13 FCC Rcd at 23018 ¶37.

<sup>234/</sup> The Commission's discriminatory exercise of its licensing power brought about minority and female underrepresentation in broadcast employment. See pp. 97-116 supra. The same behavior also brought about minority exclusion from broadcast ownership. See Comments of MMTC in MM Docket Nos. 94-149 and 91-140 (Minority and Female Mass Media Ownership), filed May 17, 1995 (incorporated by reference herein) at 6-21; Comments of the Office of Communication of the United Church of Christ and the MMTC in GN Docket No. 96-113 (Market Entry Barriers), filed August 23, 1996.

the remedial decree may not itself exacerbate de facto segregation.<sup>235/</sup>

Moreover, the FCC must enforce the Media Participation Right aggressively.<sup>236/</sup> Token enforcement,<sup>237/</sup> or belated enforcement,<sup>238/</sup> is impermissible.

By exercising its licensing and license renewal powers<sup>239/</sup> to give broadcasters free access to billions of dollars worth of

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<sup>235/</sup> For example, an attempt to substitute a vague and unenforceable obligation that broadcasters attend job fairs in place of its current requirement that broadcasters recruit minorities and women every time they have a job opening would not be a lawful component of a remedial decree.

<sup>236/</sup> In protecting access to the media through its licensing power, the FCC's role is analogous to that of the Department of Education in denying federal funds to segregated school districts. In each case, the government is more than a traffic cop; in the case of media access, the FCC must provide continual supervision. NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976).

<sup>237/</sup> See Beaumont, 854 F.2d at 505 (declaring that the FCC failed to adequately enforce the EEO Rule when it went through the motions of an investigation without following through on patently inconsistent statements of the licensee in the investigation).

<sup>238/</sup> The Commission's current efforts to find a solution to the problem of minority exclusion from ownership is laudable but may be too late. With the spectrum already almost fully occupied, any solutions the Commission might develop will require minorities to purchase entry opportunities from incumbents. Stronger EEO enforcement is the only tool left to the Commission as it seeks to stem the tide which is pushing minorities and women off the airwaves. See pp. 7-29 infra.

<sup>239/</sup> Having implemented these licensing policies, the FCC continues to ratify and perpetuate their impact every time it approves the assignment or transfer, or the renewal, of a broadcast station. Assignments and transfers are performed in such a way that the original owners of stations have virtually unfettered control over the selection of their successors. Since 1951, assignments and transfers of broadcast licenses have proceeded without consideration of competitors, and the application form for assignments and transfers is so simple that approval of station sales is virtually routine. See S. Rep. 44, 82nd Cong., 1st Sess.

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public spectrum without a clue whether they discriminate,<sup>240/</sup> the Commission violated the Fifth Amendment Due Process rights of minorities and women. Consequently, in this proceeding the Commission should issue a decree which accepts the duty of aggressively bringing about the end of employment discrimination and its present effects in the broadcasting industry.<sup>241/</sup>

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<sup>239/</sup> [continued from p. 132]

(January 25, 1951) and House Rpt. 1750, USCAN 2234 (1952) (repeal of the Avco Rule, which permitted applications to be filed which were mutually exclusive with assignment or transfer applications). Thus, the stations originally licensed by the Commission enjoy absolute control over the selection of their successors. Station sales occur in secret, shepherded by a close-knit, unregulated, virtually all-White clan of brokers. The FCC expressly declined to intervene to correct this inherently discriminatory process, purely on the grounds that correction would impose an inconvenience on broadcasters. Public Notice of Intent to Sell Broadcast Station, 43 RR2d 1 (1978).

<sup>240/</sup> The government, through deliberate actions and omissions, has prevented minorities from enjoying this extraordinarily important right. Furthermore, it deliberately and on the flimsiest of grounds adopted a plan which it knew would likely cause a resurgence of segregation -- a plan which was overturned in UCC III.

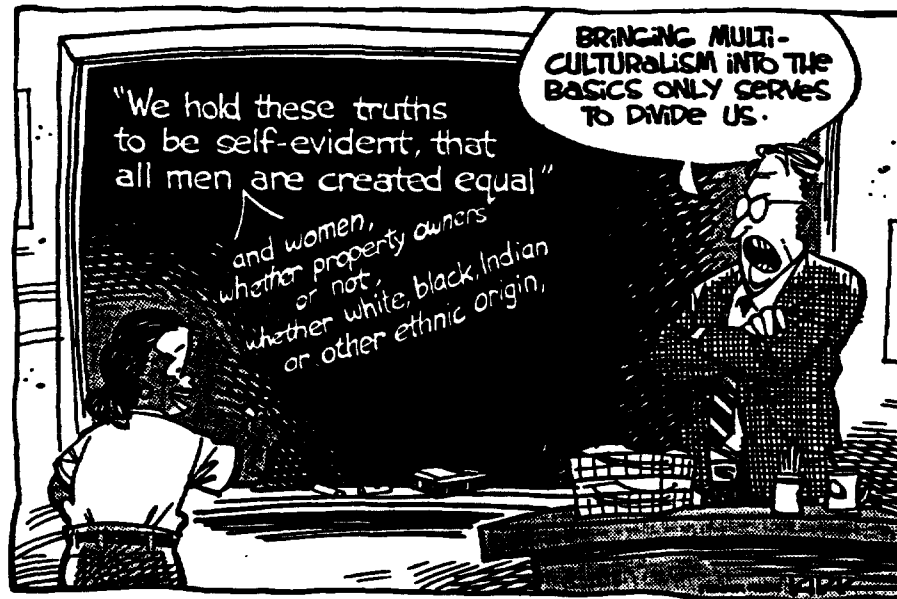
<sup>241/</sup> A final and fair question is whether this decree must involve the EEO Rule, or whether there is some other route by which the Media Participation Right enjoyed by minorities and women can be protected. The answer is that the decree must indeed involve the EEO Rule, for two reasons.

First, after deregulation, each licensee may now self-select whether to serve or disregard minorities or women. Thus, the FCC must now take even more aggressive steps to ensure that the broadcasting industry does not gravitate into a two-class system of "separate but equal" facilities, with high powered, wealthy facilities serving Whites, and low powered, economically failing facilities serving minorities. Such a system would be "inherently unequal." Brown I, 347 U.S. at 493.

Second, the Telecommunications Act has enfeebled structural regulation, see pp. 8-11 supra, and the tax certificate policy, distress sales, comparative hearings and the Mickey Leland Rule are each either dead or virtually dormant. See pp. 171-74 supra.

Thus, there are presently no other means of effectuating the Media Participation Right except through EEO regulation.

C. EEO enforcement is justified to promote individual stations' contributions to viewpoint diversity in the marketplace



Promoting diversity within a broadcast station is eminently justified. There is an ample, and surely a rational basis for promoting "intra-station" workplace diversity.

At the outset, we note with some concern the Lutheran Church court's dictum that the Constitution might not permit the government "to take account of racially based differences, much less encourage them." Id., 141 F.3d at 355. The court has misunderstood what the FCC has done since 1968 to promote diversity. The FCC's recognition of the fact of diversity and its understanding of how diversity works -- based on three generations of regulatory experience -- is not tantamount to "encouraging" diversity. Governments often regulate by accepting very widely recognized theories which are supported by overwhelming evidentiary support. That is how NASA is able to operate the space shuttle -- it accepts the theory of gravity. That is also why the NSF chooses



to fund genetic research -- it accepts the theory of evolution. Similarly, the idea that people of different backgrounds, interacting in the workplace, influence each others' behavior is a "theory" but it is supported by overwhelming evidence. It is not irrational for the FCC to recognize and act on this "theory", and these actions neither encourage nor discourage belief in this "theory."

The Lutheran Church's panel decision also appeared to question whether the government has any interest in seeing to it that broadcast workplaces are integrated, and the belief that government has no role in ensuring that talent finds a fair opportunity for expression. In dictum, the panel contending that "diversity...appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ('affirmative action' has only a temporary remedial connotation) and as a synonym for proportional representation itself." Id. at 356.

This is truly Orwellian, embedding as it does the assumption that talent is unequally distributed in society, No one seriously doubts that an integrated teaching staff produces better education than would a segregated teaching staff;<sup>242/</sup> that an integrated

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<sup>242/</sup> Bowen and Bok at 229-252, contains a thorough analysis of how interracial interactions in the college setting profoundly influence the values and perceptions of both Whites and minorities. The authors note that "[s]urveys of college seniors regularly reveal that they feel they learn almost as much from their fellow undergraduates as they do from their textbooks and professors." Id. at 252. They note that "[f]or more than one-third of a century, virtually every selective college and professional school has affirmed the value of race as an important aspect of diversity in broadening the education of students.

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penal staff or police force produces a different and more effective law enforcement than a segregated penal staff or police force; that an integrated electorate produces a different and more authentic, valid government than a segregated electorate; that integrated juries produce better informed, fairer verdicts; that integrated neighborhoods produce a healthier environment in which to raise children; or that a diverse staff is more productive than a segregated staff.<sup>243/</sup> Schools, law enforcement, voting and housing have in common that the environment being integrated based on interpersonal interactions, that these interactions carry with them the likelihood that a person's initial views, attitudes and behaviors will change for the better because of the interactions.

The case for integrating broadcasting is as strong as the case for integrating schools, law enforcement, voting and housing, for broadcasting aids in the performance of every one of these functions. Like the schools, broadcasting performs an educational function; indeed, many believe it to be as strong an educational

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<sup>242/</sup> [continued from p. 135]

Most recently, the presidents of the sixty-two member institutions of the Association of American Universities issued a unanimous statement declaring: 'We believe that our students benefit significantly from education that takes place within a diverse setting. In the course of their university education, our students encounter and learn from others who have backgrounds and characteristics very different from their own. As we seek to prepare students for life in the twenty-first century, the educational value of such encounters will become more important, no less, than in the past.'" Id.

<sup>243/</sup> In 1995 the American Management Association, ("AMA") conducted a survey of its managers entitled "Managing Cultural Diversity". Using data from 983 questionnaire responses from AMA members' managers, the survey found a significant correlation between the effectiveness of diversity training and a higher quality of work life. Diversity training programs that are overseen by front-line managers received the highest ratings.

influence as the schools.<sup>244/</sup> Like the police and penal institutions, broadcasting performs social control functions; it sets values, encourages lawful behavior, and provides information to citizens on their legal rights and responsibilities. In many cases, the police could not do their jobs without broadcasting, and broadcasting certainly makes the police's job easier. Like voting, broadcasting performs a political and democratic function; it is the primary source of information people draw upon in order to vote. Like housing, broadcasting is an integral part of the formation of communities. And broadcasting is even more than all

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<sup>244/</sup> In 1963, the Commission advised Congress that Americans' television service has a "vast impact on their lives and the lives of their children...They are the owners of the channels of television - indeed, of all broadcasting." FCC, Television Network Program Procurement, H.R. Rep. No. 281, 88th Cong., 1st Sess. 20 (1963). Dr. George Gerbner, Bell Atlantic Professor of Telecommunications at Temple University, explains:

Socialization makes us who we are, and stories are how we learn our social roles. If you are overrepresented in the culture's stories, you see many opportunities, many choices. If you are underrepresented the opposite is true....

In life, as in fiction, the choices available to people from different groups go hand in hand with the power relationships between those groups. Casting determines the role each demographic group is likely to play: success or failure, victimizer or victim. Individual programs might have a great diversity of plots, but if you look at who is doing what to whom -- or the "fate" of different characters - you see great consistency and homogeneity.

D. Jensen, "Telling Stories: How Television Skews Our View of Society and Ourselves", Cultural Environment Movement Monitor (Fall, 1998), at 2 ("Telling Stories"). Indeed, like the schools, the media is essential to the attainment or enjoyment of every element of civilized life in a modern democracy, including housing, health care, defense of one's civil liberties, and informed participation in the political process. See p. 128 supra.

of these things: it drives culture, the arts, and commerce. Thus, the FCC should hold that it has a rational -- if not a compelling -- basis for promoting diversity in broadcasting.

In rendering this holding, the FCC should reaffirm that (1) diversity of views by race and gender is a fact; (2) in a democracy, the widest possible range of viewpoints should receive a public airing; (3) because of the intimate, interpersonal nature of the work environment at a broadcasting stations, personal interactions among members of different groups are likely to result in a wider variety of viewpoints which receive a public airing; (4) the marketplace, by itself, does not automatically promote diversity; and (5) any effort to promote diversity of viewpoints by broadcasters must focus on individual stations. As we demonstrate below, each of these regulatory assumptions and findings is valid and wise.

1. **Do minorities and women tend to have interests and viewpoints distinct from those of Whites and men?**

Obviously, not all minorities or all women agree with one another, and many of them see the world exactly the way the majority of White men see the world. It would be stereotyping to suggest that no individual can or does see the world the way most members of his or her group tend to see the world. But it is not



stereotyping at all to recognize the plain fact that most members of a group tend to see the world a particular way, for entirely rational and logical reasons.

It should surprise no one that the outlook of most of those who experienced and still experience segregation, discrimination in the workplace, redlining by banks, insurance companies, and telephone companies, inadequate or brutal treatment by the police, and gross disparities in health care would have a rather different perception of which issues are important, and how those issues should be resolved, than those who have not experienced these things. Andrew Hacker has illuminated how far apart Black and White America really are:

- Income for White families averages \$36,915; for Black families, \$21,423.
- Although 8.8% of White Americans live in poverty, 31.9% of Black Americans do.
- White unemployment is 4.1%; Black unemployment is 11.3%.
- The infant mortality rate for White Americans is 8.1%; for Black Americans, 16.5%.
- 24.4% of White Americans have attended 4 or more years of college; 12.4% of Black Americans have.
- Black Americans make up less than 13% of the general population, but more than 45% of the prison population.

C. Campbell, Race, Myth and the News (1995) ("Campbell"), at 23  
(summarizing data assembled in A. Hacker, Two Nations: Black and

White, Separate, Hostile and Unequal (1992)).<sup>245/</sup>

Nonetheless, there is still a school of ideology that defines minorities merely as White people with melanin, and defines women merely as men with childbearing capacity.<sup>246/</sup> But the rendering of sound public policy cannot await those few who still do or cannot understand the difference between an inherited trait and a set of experiences which society imposes on persons because of their membership in groups having these inherited traits.

Polling data overwhelmingly demonstrates that the views of minorities tend to differ dramatically from those of Whites.<sup>247/</sup>

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<sup>245/</sup> The wealth gap by race is enormous. See "African-American College Aspirations Under News and Increasing Financial Pressures", Journal of Blacks in Higher Education (Winter 1995-1996) at 34 (reporting that "[i]n 1993 white families in the United States had a mean net worth of \$45,740. On the other hand, black families had a mean net worth of \$4,418.") Those who consider race differences to be attributable only to class may not realize that Blacks and Whites of the same social class have far different levels of economic security. Id. at 35 (reporting that "for families headed by professionals, managers and executives, blacks had an average net worth of only \$12,203 compared to similar white families' average net worth of \$66,800", findings initially reported in M. Oliver and T. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality (1995)).

<sup>246/</sup> The Center for Equal Opportunity filed Comments January 15, 1999 in this proceeding, contending that the FCC "believes that what a station broadcasts will hinge on the melanin content, ancestral homeland, and sexual organs of the station's employees and owners. That used to be called stereotyping." Id. at 1.

<sup>247/</sup> A 1997 Gallup Poll found that nearly four out of ten Whites favor scaling back government affirmative action programs, while Blacks are nearly twice as likely as Whites to favor an expansion of the programs. The poll also found that 20 to 30% more Whites than Blacks believe Blacks face equal opportunities in obtaining jobs, education and housing, as well as fair treatment in restaurants, shops, the workplace, and in the hands of police. Those polled believed that nearly twice as many Whites as Blacks say the quality of life for Blacks has improved nationwide over the

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Since these differences cut across class lines, they are specific to race.<sup>248/</sup>

Obviously, on many issues, most minorities hold views similar to the views of most Whites. Just as obviously, not all minorities agree with one another on all issues. But public opinion polls demonstrate that most minorities differ sharply from most Whites on the merits of many issues, as well as on the more nuanced questions of which issues deserve more attention, and which aspects of those

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<sup>247/</sup> [continued from p. 140]

past ten years. A. Tyson, "Perception Gap Could Stymie Racial Initiatives," The Christian Science Monitor, June 10, 1997, at 3 (Gallup). Blacks say they routinely experience prejudice day to day, with large percentages saying they have experienced discrimination in the following areas in the previous month: shopping (30%), dining out (21%), at work (21%) and with police (15%). However, Whites overwhelmingly claimed not to be prejudiced, although significant percentages of Whites did not favor a racially mixed working environment (18%), would not vote for a Black presidential candidate (7%) do not approve of interracial marriage (39%) and would object to sending their children to a school where the majority of students are Black (41%). Id. Thus, according to Frank Newport, Gallup's Editor in Chief, "[w]hites are looking at themselves and saying they are not prejudiced. Then, they extrapolate and say 'I don't believe blacks have a problem with discrimination,'". Id.

<sup>248/</sup> See, e.g., R. Farley and W. Allen, The Color Line and the Quality of Life in America (1989) at 148-50 (Black/White residential segregation significant at every economic level); G. Jaynes and R. Williams, Jr., A Common Destiny: Blacks and American Society (1989) (alienation of Blacks from White society not concentrated within any particular segment of the Black community); D. Kinder and L. Sanders, Divided by Color: Race, American Politics, and the American Ideal (1996) (to the same effect).

issues deserve emphasis.<sup>249/</sup>

The divergent views of racial groups are most starkly evident in the voting booth. Anyone who has sought public office knows that on many of the great issues of the day, most minorities do not agree with most Whites.<sup>250/</sup> In the voting booth, "race matters." The Voting Rights Act was needed precisely because the views and interests of most minorities and most Whites often profoundly differ, and because the voting power of Whites often would not protect the interests of minorities.<sup>251/</sup>

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<sup>249/</sup> The Joint Center for Political and Economic Studies' 1997 National Opinion Poll found substantial differences in Blacks', Hispanics' and Whites' views on what are the two most important national problems. They were:

Whites: #1: Crime (17.2%); #2: Government corruption and taxes (12.2%)

Blacks: #1: Crime (24.5%); #2: The economy (14.6%)

Hispanics: #1: Drugs (17.9%); The Economy (15.6%).

D. Bositis, Joint Center for Political and Economic Studies National Opinion Poll (1997) (Summary).

<sup>250/</sup> The "gender gap" in politics has also been well documented. See, e.g., "Polls Apart: Add voting to the long list of subjects where men and women don't see eye to eye," Chicago Tribune, October 27, 1996, at 1; G. Borger, "What Do Women Want?" U.S. News and World Report, August 14, 1995, at 23-27 (reporting that "the gender gap is now a chasm" in which 53% of men see government as the problem, but only 43% of women agree, and half of women think the budget has been cut too far, half of men think budget cuts haven't gone far enough.)

<sup>251/</sup> The divergent worldviews of the races are hardly unknown to political operatives, and their exploitation of this fact is most evident during elections. Diversity of voices is especially critical in elections, when stereotypes about minorities are often used as cynical ploys for votes, and the media's role in legitimizing a candidate may hinge on that candidate's race. See generally C. Anthony Broh, A Horse of a Different Color: Television's Treatment of Jesse Jackson's 1984 Presidential Campaign (1987).



The divergent views of racial groups are dramatically evident in their broadcast programming choices.<sup>252/</sup> Indeed, given the very poor record of the White media in addressing minority needs and issues,<sup>253/</sup> it should come as no surprise that minorities tend not to trust the White media.<sup>254/</sup>

The Supreme Court agrees that it is not stereotyping to recognize that most minorities tend to view the world differently than most White people view the world. In a portion of Metro Broadcasting, which was not overruled by Adarand, the Court explained:

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<sup>252/</sup> "The Steve Harvey Show" and "The Jamie Fox Show" are the current first- and second-ranked shows among Black viewers. Among Whites, they're 127th and 120th. "ER", the top-ranked show among Whites, is number 15 among Blacks, and "Friends," ranked second among Whites, is number 88 among Blacks. de Moraes at C7. See also "A Racial Divide Widens on Network TV", New York Times, December 29, 1998, A.1, Col. 3 (reporting that shows most watched by Whites are least watched by Blacks and vice-versa, with a great divide in terms of both casts and audiences of popular shows); J. Schement, "Thorough Americans: Minorities and the New Media", in A. Garmer, ed., Investing in Diversity: Advancing Opportunities for Minorities and the Media (1998), at 87, 109 (finding that "most programs popular among African American audiences feature African American characters, while programs popular with whites feature white characters.")

<sup>253/</sup> See pp. 159-66 infra.

<sup>254/</sup> See K. Mireles, "The Road to Influence," Hispanic Business, October, 1998, at 32, 48 (surveying the magazine's 100 most influential Hispanics and finding that only 6% rated the English language media's overall coverage of Hispanic issues as "very good" or "good" while 72% rated the Spanish language media's overall coverage of Hispanic issues as "very good" or "good"); "Study Reveals Blacks Trust Black Media Most and Magazines Have Highest Trust Level Of All", JET, November 2, 1998, at 57 (reporting on a study by Ketchum Public Relations' African American Markets Group and Florida A&M University's School of Business and Industry, of a statistically representative sample of 503 Black adults, that found that Blacks had the highest (87%) level of trust in Black magazines, followed by Black television news (80%) and Black radio news (77%). Only one non-Black outlet, Consumer Reports, placing in the top five trusted sources.)

Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled "minority programming" or that programming that might be described as "minority" does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.

497 U.S. at 579 (emphasis supplied). The Court concluded that

[w]hile we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves [emphasis supplied].

497 U.S. at 582.<sup>255/</sup>

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<sup>255/</sup> This principle is developed in some detail in Trigg, 4 CommLaw Conspectus at 254-55:

The Commission does not assume that an increase of minorities and women on staff will always facilitate an increase in minority and women-oriented programming or the expression of minorities and women viewpoints. A diversity of personnel, particularly in decision-making management positions, can influence not only the kinds of news stories that are broadcast, but who will report these stories as well.

[n. 255 continued on p. 145]

Thus, while no person should be hired to singlehandedly represent all minorities or all women, it is not stereotyping to predict that ten minority broadcast professionals will more likely reflect the thinking prevalent in the minority community than will ten White people. Nor is it stereotyping to think that a radio station with 40 employees, ten of whom are minorities, will treat issues differently than another station with 40 employees, only one or two of whom are minorities. Nor is it stereotyping to predict that listeners scanning a dial with ten stations, several of which have 40 employees, an average ten of whom are minorities, will more likely receive a wider range of viewpoints than would the listeners to ten other stations, each of whose staffs is 40 White males.

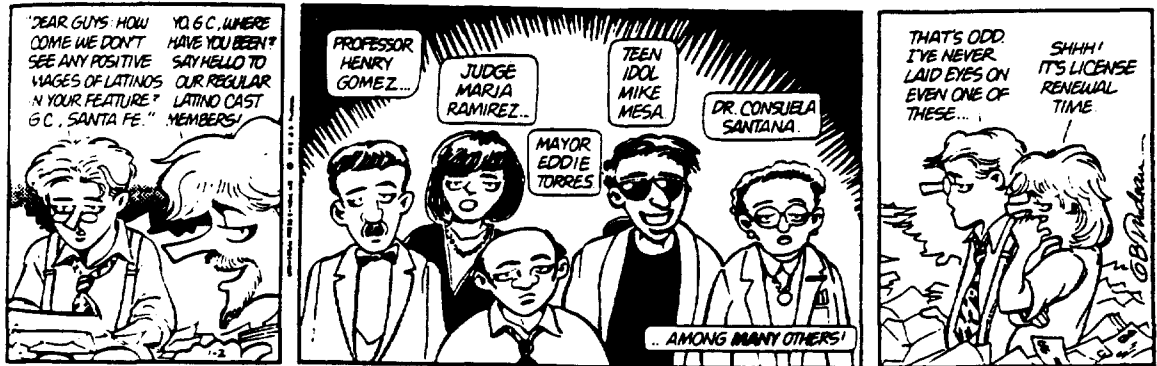
Broadcast EEO regulation is not based on racial stereotyping. Instead, by fostering interracial communication, FCC EEO regulation would do more than perhaps any other federal policy to attack racial stereotyping.

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255/ [continued from p. 144]

One can only wonder what particular national news events would have been reported, if there were more minority and female network or local news chiefs, executive directors, or producers at the decision-making level. For example, it is questionable whether the local television stations in Boston would have embraced the Charles Stuart murder case so quickly, or the disturbingly similar Susan Smith case in South Carolina, both of which implicated a mythical black assailant for hideous crimes committed against white victims, if there had been increased representation of the African-American community harmed by the stereotypical portrayal of a murder suspect" (fns. omitted).

2. Is the public interest served when broadcasters transmit the views of minorities and women?



It is axiomatic in a democracy that the mass media may be regulated in order to protect "the widest possible dissemination of information from diverse and antagonistic sources." Associated Press v. United States, 326 U.S. 1, 20 (1945).<sup>256/</sup> The D.C. Circuit has long recognized that "the 'public interest' standard necessarily invites reference to First Amendment principles." FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978), quoting Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 122 (1973). Thus, "Congress may...seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate

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<sup>256/</sup> This is colloquially known as the "Associated Press principle."

broadcasting stations." FCC v. League of Women Voters of California, 468 U.S. 364, 377 (1984).<sup>257/</sup>

On the one occasion on which the Supreme Court has interpreted the (former) EEO Rule in light of the Associated Press principle, it held that the EEO Rule "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934...to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." NAACP v. FPC, 425 U.S. 662 at 670 n. 7. This holding confirms that EEO regulation to promote diversity serves the public interest.

**3. Does a race- and gender-integrated workplace result in intra-station diversity? Does a segregated workplace inhibit diversity?**

Employment diversity works in broadcasting because of the nature of the product being produced: communication of ideas and values with the rest of the world.

No social policy must have 100% congruence between its goals and each instance in which it is applied. Thus, it is reasonable to accept the fact that having more minorities and women in broadcasting will not automatically, in every instance, translate

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<sup>257/</sup> See also Metro Broadcasting, 497 U.S. at 548 (holding that "safeguarding the public's right to receive a diversity of views and information over the airwaves is...an integral component of the FCC's mission.") The Metro Broadcasting Court also recognized that "the interest in enhancing broadcast diversity is, at the least, an important governmental objective." Id. at 567 (emphasis supplied). Recently, the Commission recognized that a multiplicity of broadcast networks -- specifically, the creation of a fourth network -- was so important that a licensee's alleged violation of the foreign ownership limitations in the Communications Act could be overlooked or forgiven. Fox Television Stations, Inc., 10 FCC Rcd 8452, 8523 ¶177 (1995) (subsequent history omitted).

into more access for the views of most minorities and women. But it is absurd to think that having more minorities and women in broadcasting never makes a difference. Minorities and women seldom speak of only the same things as White men when they participate in program, news assignment and PSA scheduling meetings.

Most important, minorities and women share their lifetimes of different experiences when they join in the myriad on- and off-site staff social interactions. In these off-line interactions, those who have in common the strong bond of a life in broadcasting are able to share with one another their hopes, dreams, aspirations -- and views. That is how employment diversity works.

We have noted the vast differences between Blacks and Whites in perceptions of the existence of prejudice. See Gallup (poll results discussed at p. 140 n. 247 supra). The Gallup Poll explains that the central factor explaining this perception gap is that Blacks have far greater daily contact with Whites than Whites do with Blacks. Id. This important finding demonstrates the profound importance of interracial interaction in forming and challenging prejudices and perceptions about persons unfamiliar to us.

The best proof that employment diversity works is the difference between broadcasting now and broadcasting under de jure and de facto segregation. Recall how one-sided broadcast programming was before stations began hiring minority producers researchers and reporters. The virtually segregated broadcast industry which predated the FCC's EEO Rule provided living proof that a diverse staff generates vastly different programming than one with a diverse staff. At a broadcast station, no one works in isolation, and everyone's opinion matters. Employment diversity

yields program diversity because intra-station communication is the fuel which drives a broadcast station.<sup>258/</sup>

The American Federation of Television and Radio Artists (AFTRA) -- which certainly knows what broadcast employees do on the job, and in early Comments in this proceeding AFTRA firmly explained that diverse employment results in diverse programming:

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<sup>258/</sup> Christopher Campbell describes the myth-making nature of broadcast journalism and traces it to the nature of broadcasting itself:

Considering the multicultural makeup of [American] society, the most dangerous (and the most common) myths may be those that reflect white, middle- and upper-class notions of society and impede multicultural understanding and interpretation....The nature of local television news makes it especially susceptible to myth-making. Stories are brief - many less than half a minute - and feature quick sound bites accompanied by rapid fire video. The stories deemed worthy of coverage are those that can best be told with pictures: fires, news conferences, crime scenes and handcuffed criminal suspects dominate the newscasts. The brevity of the stories calls for the most simple explanations of events, ignoring the complexities that tend to surround many stories. And the bulky process of local TV news hardly allows for much thoughtful analysis of the day's events. Photographers, reporters, videotape editors, producers and anchors - usually under remarkable pressure to meet the evening's deadlines - can each dramatically affect the way a story is told.

Campbell at 12-13.

AFTRA agrees with the Commission's view that the employment of minorities and women in both high level management positions and lower level positions in the broadcast industry will assist in ensuring that program diversity will be promoted. Our experience, through administering hundreds of collective bargaining agreements with television and radio stations across the country, leads us to the conclusion that such a nexus does exist. While it cannot be said that program diversity at those stations results solely [from] the employment of minorities and females, it has been our experience that these employees have considerable influence over programming.

Comments of AFTRA, filed January 19, 1999, at 6.

Just as a diverse station produces diverse programming a monochromatic station tends to produce monochromatic programming. Programmers, journalists, and other station employees with whom they deal professionally and socially (including support staff) have enormous day-to-day power to establish the menu for the public communication which is the nutrition of democracy. They bring to this task the range of experiences they've enjoyed in life up to that time. As Commissioner Gloria Tristani has explained:

I have no doubt that more Latino owners, more Latino writers and more Latino producers will have a major impact on the way the Latino community is portrayed. It's not that only Latinos can write about Latinos, or that only Latino reporters can cover the Latino community. But we have a lifetime of experience as Hispanics to bring to the table. We know the realities and the subtle nuances of our community that other's don't. Which is why, I think that so much of what is shown about Latinos on TV seems like such a caricature of who we are.



Remarks of FCC Commissioner Gloria Tristani before the Hispanic National Bar Association, October 1, 1998, at 3-4.

Until the FCC adopted its EEO Rule, minorities were routinely excluded from local and national television programs.<sup>259/</sup> Behind the scenes, all-White, all-male newsrooms predominated.<sup>260/</sup> Thus, it is unsurprising that the nation's all-White newsrooms did not predict or understand the 1960's race riots, and they were at a loss in attempting to cover the riots. Even well meaning White journalists were almost universally surprised by the riots, but almost no one in the Black press was the least bit surprised. It was in the wake of these race riots that the Commission, Congress, and the media recognized the striking absence of authentic voices from minority communities in news and entertainment programming.<sup>261/</sup> Even now, racial minorities are nearly invisible in mainstream entertainment programming<sup>262/</sup> and in broadcast and

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<sup>259/</sup> D. Brenner, "Ownership and Content Regulation in Merging and Emerging Media," 45 DePaul Law Review 1009, 1021 (1996) ("Brenner"), citing Report of the U.S. National Advisory Commission on Civil Disorders (1968) ("Kerner") at 385-86 (noting that Blacks were largely neglected on television and recommending they be included in all forms of television programming).

<sup>260/</sup> Brenner at 1021 (footnote omitted).

<sup>261/</sup> Brenner at 1020-21, citing Kerner at 382-89 (identifying systemic racial exclusion in news and entertainment programming and proposing the establishment of a private, nonprofit entity to carry out the media recommendations of the Commission to address these problems).

<sup>262/</sup> Brenner at 1021, citing, e.g., G. Braxton and J. Breslauer, "Casting the Spotlight on TV's Brownout; Critics Say the Networks are Ignoring America's Fast-Growing Minority," Los Angeles Times, March 5, 1995 (Calendar) at 8; M. Gardner, "A Call for More Minorities (and Fewer Stereotypes) on TV", Christian Science Monitor, March 13, 1995, at 12; M. Mendoza, "Sitcom Segregation", Dallas Morning Times, August 25, 1996, at C1; M. Perigard, "How Well Does Prime-Time TV Match the Makeup of Society? An Exclusive TV Plus Survey Raises Troubling Issues", Boston Herald, November 5, 1995.

print media newsrooms.<sup>263/</sup> Yet in cities like Jackson, Mississippi today, broadcast programming is quite different than it was in 1969, when UCC II was decided and the interim licensee brought in Bill Dilday as the nation's first Black television general manager.

Intra-company diversity works especially well in broadcasting because of the type of people attracted to broadcast careers. Broadcast professionals chose this field because they are engaged with ideas, issues and policy. They are communicative and collaborative. Nothing promotes diversity more than a workplace environment which fosters interracial communication among these individuals, who share the goal of presenting the fruits of their shared communication to the public through a communicative medium.

In enacting the Cable Television Consumer Protection and Competition Act of 1992, Congress recognized that diversity in employment promotes diversity in programming:

The Courts and the Commission have consistently recognized the increasing amount of programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper level positions within media companies. In addition, the Committee recognizes that a strong EEO policy is necessary to assure that sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities....The Committee notes that women and minorities are still significantly under-represented as employees and owners in the industry.

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<sup>263/</sup> Brenner at 1021, citing George Garneau, "Tempers Flare; Minority Journalists Tell National Newspaper Association Officials That More Has to Be Done in Diversifying Newsrooms", Editor & Publisher, December 12, 1992, at 14.

H.R. Report No. 102-628, 102d Cong., 2d Sess. 144 (1992).

**4. Does the marketplace independently  
promote viewpoint diversity?**

If listener surveys alone determined what was broadcast, viewpoint diversity would be promoted by the marketplace without any help from the FCC. But that isn't how broadcast programming decisions are made. The prejudices and tastes drawn from the experiences and backgrounds enjoyed by the 98% White owners certainly play an enormous part in programming decisions. Even more fundamentally, advertisers' dollars have more influence than listeners' program choices. In advertiser supported commercial broadcasting and corporate donor-supported public broadcasting, the revenues do not come directly from broadcast consumers. Broadcast audiences are disproportionately minority and female. However, the advertisers, who translate product demands into advertising buys, are overwhelmingly White and male, and they often prefer to reach the White males they consider "prospects" rather than minorities they consider "suspects."<sup>264/</sup>

Furthermore, even those acting without prejudice will prefer to program to a general market audience rather than narrowcast. A narrowcasted program will be broadcast only when it will generate the same level of advertising dollars as the least attractive of several general audience programs, and that "several" can be quite a large number indeed before the best narrowcast program is aired.<sup>265/</sup> Thus, it is not surprising that although Black viewers

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<sup>264/</sup> See Civil Rights Forum, supra.

<sup>265/</sup> See S. Wildman and T. Karamanis, "The Economics of Minority Programming," in A. Garmer, ed., Investing in Diversity: Advancing Opportunities for Minorities and the Media (1998) at 47.

spend far more time watching television than does the general population, "out of more than 115 shows airing on the six broadcast networks, only 18 shows feature an African American cast or lead character, with 10 of them airing on UPN and The WB", according to Electronic Media.<sup>266/</sup> As Mark Zakarin, Executive Vice President of Original Programming for Showtime Networks put it, "[t]he goal is to cast the net as wide as you can because you're in a tonnage game to deliver all of those viewer eyes to your advertisers."<sup>267/</sup>

EEO recruitment, which tends to result in diverse station staffs, certainly will not entirely counterbalance the disincentives to serve minorities which flow from the nature of advertiser-supported media. But the fact that a regulation will not entirely solve a problem is no reason not to adopt it. By restoring some measure of EEO regulation, the FCC will certainly help compensate from the marketplace prejudices and imperfections which would otherwise tend to diminish and drive out minority viewpoints.

**5. Must a diversity-promoting regulatory program focus on individual stations?**

The Communications Act contemplates regulation on a station by station basis. Under Section 309 of the Act, the Commission must make an affirmative determination of each station's qualifications for renewal. It must have some criterion upon which to make this determination, and if EEO is deregulated, the

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<sup>266/</sup> L. Hall, "Racism or ratings? African Americans watch more TV, yet are often ignored by networks," Electronic Media, February 1, 1999, at 12.

<sup>267/</sup> Id.

Commission will have none left. Recall how difficult it was to choose among competing applicants for new noncommercial stations, when essentially the only comparative criterion was auxiliary power.<sup>268/</sup> That is exactly where the FCC will find itself if EEO is gone. The absence of EEO and every other substantive radio rule<sup>269/</sup> would leave the Commission no rational basis to make its Section 309 public interest determinations at renewal time.

Yet quite apart from the requirements of Section 309, there are five practical reasons why the FCC ought to promote intra-station diversity.

First, the minority ownership policies are insufficient to achieve this goal. Even when those policies were in effect, they enabled minorities to obtain only 3% of the nation's broadcast facilities and less than 0.5% of broadcast industry asset value. Now that those policies are gone, minority ownership is in free-fall. In many markets, there are no minority owned stations.

Moreover, not all minority owned stations choose to provide alternate viewpoints; they are not required to do so, and some don't. Furthermore, although having Whites receive the views of

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<sup>268/</sup> Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577, 2580 n. 8 (Rev. Bd. 1991) (decision by Board Member Blumenthal) (characterizing noncommercial comparative criteria as "vague" and "meaningless").

<sup>269/</sup> EEO is the only remaining intra-station policy available. All of the others -- the Fairness Doctrine, ascertainment, programming guidelines -- are gone. In Deregulation of Radio, 84 FCC2d at 1036 Appx. D, the FCC observed that

it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these [minority] groups is [sic] preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public.

minorities is critical to the success of any pro-diversity policy,<sup>270/</sup> most Whites do not tune in minority media.<sup>271/</sup> Thus while the minority ownership policies are helpful in enabling viewers and listeners to receive diverse views over the airwaves, these policies simply aren't strong enough to do even a fraction of the job. Furthermore, policies aimed at regulating programming and attempting to ensure that owners are informed of community concerns have been repealed.<sup>272/</sup>

However, owners are not the only influences on station programming. Owners are seldom involved in rendering a station's dozens of day-to-day programming decisions; indeed, owners who micromanage programming seldom attract talented staffs.<sup>273/</sup> Programmers influence programming, and station employees who

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<sup>270/</sup> See pp. 159-66 infra.

<sup>271/</sup> For example, White viewers are only 5% as likely to tune in BET than they are likely to tune in the average basic cable network. "African Americans in the Media: A Special Report," Electronic Media, February 1, 1999, at 1, 16.

<sup>272/</sup> Deregulation of Radio, supra.

<sup>273/</sup> In dictum, the Lutheran Church's panel decision opined that "intra-station" diversity "makes no sense" because in radio, "each station targets a particular segment: one po, one country, news news radio, and so on." Id., 141 F.3d at 356. The Court appeared to believe that diversity of viewpoints could instead be assured through minority ownership policies. Id. at 355-56. Actually, the regulatory system that "made no sense" to this court has been approved by every other court that has considered the subject, every member of the FCC since 1934, and every Congress that has considered the question. At a minimum, these persons and entities were "rational" in believing that the FCC should promote "intra-station" diversity of viewpoints.

interact with the programmers thereby influence programming.<sup>274/</sup>

Second, a program which does not include all stations will be observed by few or no stations. The reason is well known to economists: the free rider problem.<sup>275/</sup> To the extent that training minorities and women imposes costs -- however modest they might be -- those costs should be distributed equitably among all broadcasters.<sup>276/</sup> When some firms opt out of sharing a communal expense, the average cost to the remaining firms becomes greater.

Third, the amount of opportunity made available and the amount of diversity generated are driven by the number of stations covered by the diversity-promoting policy.<sup>277/</sup> Irrespective of the

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<sup>274/</sup> As AFTRA has pointed out, broadcast employees who influence programming "do not necessarily occupy positions in top-level management. AFTRA represents a varied array of broadcast employees, including production assistants, writers, reporters and anchors, all of whom exert considerable influence over the production of programming." Comments of AFTRA at 6. This is true in most businesses: GM's top managers do not design Buicks by themselves. Indeed, GM relies on suggestions from women assembly line workers to design more woman- and child-friendly vehicles.

<sup>275/</sup> See p. 34 n. 66.

<sup>276/</sup> Recruitment actually imposes virtually no costs on stations. See pp. 7-8 supra. But some broadcasters and broadcast managers still find it psychologically bothersome or inconvenient to have to recruit minorities and women. Thus, they suffer costs, although those costs are nonpecuniary. The free rider problem applies to both pecuniary and nonpecuniary costs.

<sup>277/</sup> There can never be too much diversity. In Multiple Ownership of Broadcast Stations, 22 FCC2d 306, 311 (1970), the Commission recognized that "[a] proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be that the 51st licensee...would become the communication channel for a solution to a severe local social crisis. No one can say that the present licensees are broadcasting everything worthwhile that can be communicated."

free rider problem, if only a few stations are expected to provide opportunity, there will be less overall opportunity. In some markets, there will be none, because if some stations were permitted to opt out of EEO regulation, all would do so.<sup>278/</sup> Certainly, had the FCC allowed for opting out in 1969, it would be a very rare broadcast station that would have opted in, and in some states no station would have opted in. Like other regulations aimed at maximizing a social goal, full participation is essential. The prevalence of semiautomatic weapons on the streets certainly isn't helped by the exclusion only of foreign-made arms, when domestic arms are freely available. Cancer-causing pollutants remain in abundance in part because so many types of vehicles and factories are permitted to opt out.

Fourth, the ability of EEO pro-active stations to provide opportunity depends profoundly on whether other stations also provide opportunity. Broadcast stations don't operate in isolation from other stations. Each station's ability to diversity its staff

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<sup>278/</sup> The fruits of broadcast deregulation starkly demonstrates what happens when the FCC deregulates broadcasting. A study of commercial television programming in five markets for two weeks in 1998 found that 40 stations aired 13,250 hours of programming, only 46.5 (0.35%) of which were devoted to local public affairs. In three of the five markets, not one station aired any local public affairs programming, and 70% of all of the stations provided no local public affairs programming. 35%# provided no local news, and 25%\$ offered neither local public affairs programming nor local news. Only two hours of local public affairs programming was aired from 6:00 PM to midnight; most aired on Saturdays and Sundays before 8:00 AM. Benton Foundation and Media Access Project, "What's Local about Local Broadcasting?" (1998) (reporting on stations in the Bangor, Chicago, Nashville, Phoenix and Spokane markets.) Many broadcasters piously assert that EEO regulation is unnecessary because it is good business, but these same broadcasters also argued that local public affairs programming would continue because it, too, was good business. Thus, imagine what would happen to minority and female employment and viewpoint diversity if EEO, too, were "deregulated."



depends on the existence of a pool of people who had been able to receive training and experience. Talented people usually move on to other stations; almost no one stays at one station forever. Thus, stations wishing to operate with a diverse staff are inhibited from doing so if they are forced to draw staff from a pool of those trained by stations not practicing equal opportunity.

Fifth, EEO at all stations ensures that all demographic groups can receive views of minorities and women -- even though each person may listen to only a few stations. The FCC developed its EEO Rule in response to the finding of the Report of the National Advisory Commission on Civil Disorders that

the communications media, ironically, have failed to communicate. They have not communicated to the majority of their audience - which is white - a sense of the degradation, misery, and hopelessness of living in the ghetto. They have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of - and thus have not communicated - a sense of Negro culture, thought or history.

Kerner at 383, cited in Nondiscrimination - 1968, 13 FCC2d at 769 (emphasis supplied).279/

The Kerner Report exposed and carefully dissected the mass media's failure to foster interracial communications. The report charged racism in the media with helping cause the 1960s' civil

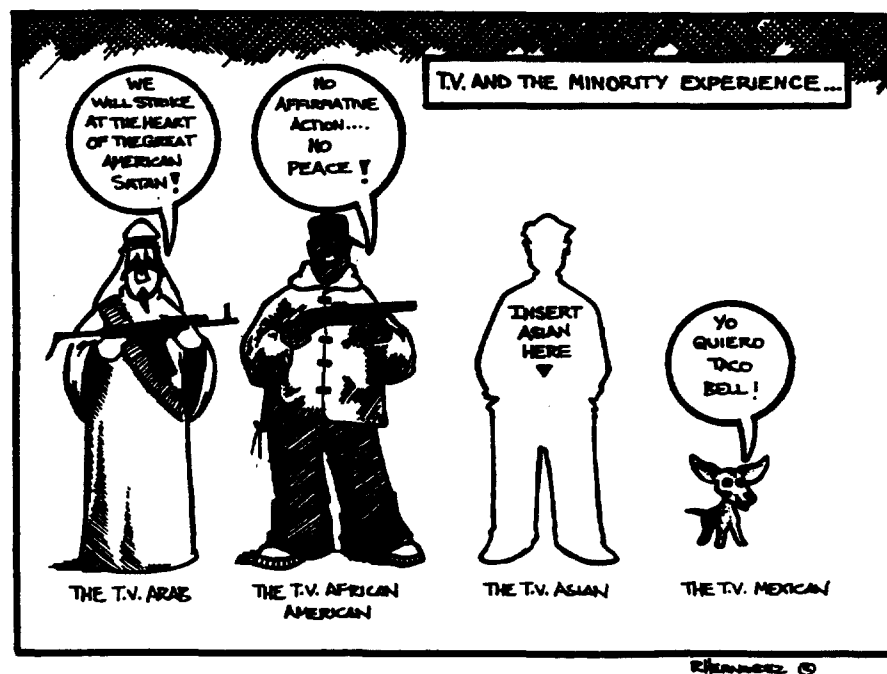
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279/ Of course the problem of poor interracial communication through the mass media did not end with the Kerner Report. In 1995, the Federal Glass Ceiling Commission recommended that the broadcasting industry "recognize the urgency of getting women and minorities into decisionmaking positions, especially in television." Federal Glass Ceiling Commission, A Solid Investment: Making Full Use of the Nation's Human Capital, Recommendations of the Federal Glass Ceiling Commission, November, 1995 ("Glass Ceiling Recommendations") at 47.

disturbances. Most significant was the Report's findings of the lack of sensitivity of the White media:

The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slight and indignities are part of the Negro's daily life, and many of them come from what he calls the "white press" - a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform the whole of our society.

Id. at 203. Indeed, it is not only minorities who suffer from not having minority views available: Whites also need to hear those views. Owing to the growing complexity of society, knowledge of other groups is increasingly based on perceived personal characteristics.<sup>280/</sup> When personal intergroup contact is absent or



<sup>280/</sup> Abramson, Mizruicky and Hornung, Stratification and Mobility (1976) at 9.

limited, media portrayals of members of other groups must instead serve the function of definition or confirmation of perceptions of other groups. Thus, when and if it addresses racial issues, the media can be a powerful force reducing negative stereotyping.<sup>281/</sup>

The power of the media to determine how group members know members of other groups is suggested by a classic study demonstrating that one quarter of young White viewers reported that "most of the things I know" about Blacks come from television viewing.<sup>282/</sup> This "most of the things [Whites] know" about Blacks from television has frequently been negative, stereotypical, incomplete or inaccurate.<sup>283/</sup>

According to North Carolina State University Robert Entman and Indiana University Professor Andrew Rojecki, scientific studies of prejudice "suggest a connection between exposure to television news and the extent of anti-black sentiments among whites. While these findings are far from definitive, they do indicate that the images of blacks in the news contribute to the perpetuation of anti-black stereotypes....Experimental work strongly supports the proposition that viewing stereotyping stimuli in TV news reports

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<sup>281/</sup> Scherer, "Stereotype Change Following Exposure to Counter-Stereotyping Media Heroes," 15 Journal of Broadcasting 51 (1970).

<sup>282/</sup> Atkin, Greenberg & McDermott, "Television and Race Role Socialization," 60 Journalism Quarterly 407, 414 (1983).

<sup>283/</sup> See Worthy, "Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue," 18 COMM/ENT 509 (Spring, 1996) ("Worthy"); Roberts, "The Presentation of Blacks in Television Network Newscasts," 52 Journalism Quarterly 50 (1975); Fife, "Black Images in American TV: The First Two Decades," 6 Black Scholar 7 (November, 1974); Roberts, "The Portrayal of Blacks on Network Television," 15 Journal of Broadcasting 45 (1970).

activates prejudicial judgments."<sup>284/</sup>

This understanding of the role of media in advancing interracial communication has underscored the Commission's diversity policies for over a generation. When it first considered adopting the EEO Rule, the Commission cited with approval this statement by the Department of Justice:

Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.

Nondiscrimination - 1968, 13 FCC2d at 771. More recently, the Glass Ceiling Commission observed,

[t]he media do not reflect America so much as shape America. The media play a critical role in developing and eliminating stereotypes and biases that affect the way minorities and women are viewed in society at large and in the workplace.

Glass Ceiling Recommendations at 46.

The Commission has long understood the role of the media in racial socialization and promoting intergroup understanding and communication. In 1982, it held that those most in need of receiving access to minorities and women's views are often those who frequently listen to stations which do not target their

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<sup>284/</sup> R. Entman and A. Rojecki, "Minorities in the Mass Media: A Status Report", in A. Garmer, ed., Investing in Diversity: Advancing Opportunities for Minorities and the Media (1998) at 67, 72.

programming to minorities and women.<sup>285/</sup> See Waters, 91 FCC2d at 1265.

The need for diverse views on all stations is especially critical in light of the media's endemic underrepresentation<sup>286/</sup>

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<sup>285/</sup> This point is illustrated by the recent decision by CBS to terminate the "Greaseman" from WARW-FM, which serves the Washington, D.C. market. On the day the penalty phase of the James Byrd case was being concluded, and one day before the Grammy Awards at which Lauryn Hill won a record five awards, the "Greaseman" played a Lauryn Hill record and commented "no wonder people drag them behind trucks." F. Ahrens, "'Greaseman' Fired After Protests Over Remark", Washington Post, February 26, 1999, at A-1. The "Greaseman"'s audience consisted almost entirely of 25-54 year old White males. Most of the protests following the "Greaseman"'s comments did not come from this audience; they came from listeners to other Washington area stations targeted to Black audiences (including stations also owned by CBS). Id. at A-10.

<sup>286/</sup> The 32-year longitudinal Cultural Indicators Project of Dr. George Gerbner and his colleagues at the University of Pennsylvania's Annenberg School of Communications and Temple University has documented the endemic, gross underrepresentation of minorities, women (especially older women) and the poor from series, films and animated cartoons seen on prime time network television. Its 1998 report, "Casting and Fate in '98" includes among its Highlights the following conclusions:

- Despite slight progress toward more equitable representation, men still outnumber women two to one.
- The representation of African American males (but not females) increased each year until it reached 171 percent of its real-life proportion.
- Asian/Pacific characters are still less than one-half of their proportion of the U.S. population.
- Latino/Hispanic characters are less than one third of their real proportion of the U.S. population.

[n. 286 continued on p. 164]

and endemic stereotyping of minorities and women;<sup>287/</sup> its

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<sup>286/</sup> [continued from p. 163]

- The characters (especially women) are also younger. The stage is set for more younger women-older men relationships.
- Characters with disabilities still do not play "normal" roles, and decline in numbers.
- Women age faster than men, and as they age they become more evil.

G. Gerbner, "Casting and Fate in '98: Fairness and Diversity in Television" (1998), at 1.

This pattern also applies to the network news. ADT Research, publisher of "The Tyndall Report," has performed a ten year longitudinal study on representation in the ABC, CBS and NBC evening newscasts entitled "Women, Men and Media." Its study of these newscasts from January through June, 1998 reached these conclusions:

- White people represent 72% of the population but had 86% of the soundbites
- Men and boys represent 49% of the population but had 76% of the soundbites
- Babyboomers represent 31% of the population but had 52% of the soundbites.

ADT Research, "Women, Men and Media: Who Speaks for America? Sex, Age & Race on the Network News" (1998), at 1.

See also Rockey, "Seeking Balance: Women's Voices in the Media," The Diversity Factor, Spring, 1997, at 22 (surveying women's underrepresentation in the media and its effects).

<sup>287/</sup> Media stereotypes were addressed by the publisher of the nation's first Black newspaper: "From the press...we have suffered much by being incorrectly represented....Our vices and our degradation are ever arrayed against us, but our virtues are passed by unnoticed." John B. Russworm, Freedom's Journal, March 16, 1827. According to Campbell, "[a]lthough the outrageous stereotypes of pre-civil rights era media may no longer exist, contemporary racism lurks beneath the surface of many portrayals ....The commonsense selection process of news organizations often dictates coverage of 'negative' minority news, while 'positive' stories about progress and success in minority communities tend to be shelved due to what journalists consider a lack of newsworthiness." Id. at 30. Campbell cites a host of research studies documenting the lack of coverage of minorities by the news or seriously distorted coverage. Id. at 30-31.

propensity to use language, codes and symbols which foster prejudice;<sup>288/</sup> and its endemic failure on its own to address the needs of minorities and women.<sup>289/</sup> These media practices have profound social consequences.<sup>290/</sup> All of these media tendencies

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<sup>288/</sup> See, e.g., M. Muharrar, "Media Blackface: 'Racial Profiling' in news reporting," Extra!, September/October, 1998 at 6-8 (documenting how print and broadcast outlets often use race as code for crime through indirect association and stereotyping, leading viewers automatically to assume that criminals were minorities and to dramatically overstate the proportion of crimes done by minorities). For example, this habit of the White media is dramatically illustrated by its coverage of affirmative action. Louis Harris has written that "when applied to hiring minorities a majority of Whites are convinced that 'preferential treatment' means giving an unqualified Black a job over a qualified White man, or 'reverse discrimination' against White men. Yet, when asked what affirmative action means to them, 68% of the same whites say it 'is a program designed to help women and minorities who have not had an equal chance to have an equal opportunity in education or in a job.'" L. Harris, "The Power of Opinion", Emerge, March, 1996, at 50. Harris concludes that some in the media "have done the public a disservice by continually referring to 'preferential treatment' or 'preferences' or 'racial preference programs' as interchangeable with affirmative action." Id. at 50. See also J. Jackson, "Affirmative Action Coverage Ignores Women - and Discrimination," Extra!, January/February, 1999, at 6-8 (documenting that the typical story covering affirmative action focuses on minorities rather than the primary affirmative action beneficiaries -- women, and that most coverage of affirmative action disregards the prevalence of discrimination).

<sup>289/</sup> The FCC has long recognized that it is essential for all broadcasting stations to address minority needs. In 1960, the FCC included "minority groups" as one of several groups whose programming needs were to be met by television licensees in order to meet their public interest responsibilities. En Banc Programming Inquiry, Report and Statement of Policy, 44 FCC 2303, 2314 (1960). While the FCC no longer requires each station to meet those needs, it still requires each station to undertake efforts likely to generate a workforce whose climate, in turn, will tend to ensure that those needs are met by a great many stations.

<sup>290/</sup> According to Howard Law School Professor Patricia Worthy, "most of what [whites] know" about Blacks from television has frequently been negative, stereotypical, incomplete or inaccurate. See Worthy, 18 COMM/ENT at 531-539 (surveying current research findings on the effects of televised racial stereotyping).

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have been documented thoroughly by scholars.<sup>291/</sup> Reviewing the literature, Christopher Campbell concludes that "[t]he most common reason cited for news organizations' poor coverage of American minorities is the paucity of those minorities in America's newsrooms." Campbell at 31; see also id. at 38 (collecting research on minority representation in the nation's newsrooms).

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"Intra-station" diversity is not the only justification for having an EEO program, and such a program would be well justified even if entirely remedial. See pp. 97-133 supra. However, diversity continues to be an appropriate function for the FCC under Title III of the Telecommunications Act. The FCC's choice of EEO as a content-neutral, race- and gender-neutral means of promoting this goal is wise, appropriate and deserving of full support.

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<sup>290/</sup> [continued from p. 165]

Dr. Jannette Dates, Dean of the School of Communications of Howard University and Howard School of Communications Professor William Barlow explain that "[r]acial representations help to mold public opinion, then hold it in place and set the agenda for public discourse on the race issue in the media and in the society at large. Black media stereotypes are not the natural, much less harmless, products of an idealized popular culture: rather, they are more commonly socially constructed images that are selective, partial, one-dimensional, and distorted in their portrayal of African-Americans. Moreover, stereotyped black images most often are frozen, incapable of growth, change, innovation or transformation." J. Dates and W. Barlow, Split Image: African Americans in the Mass Media (1990), at 5.

<sup>291/</sup> Several compilations of this research have been published since Metro Broadcasting annotated studies performed during the 1980s. See, e.g., Christopher P. Campbell, Race, Myth and the News (1995); Herman Gray, "Television, Black Americans, and the American Dream," at 131-145 in Venise T. Berry and Carmen L. Manning-Miller, eds., Mediated Messages and African-American Culture (1996); Clint C. Wilson and Felix Gutierrez, Race, Multiculturalism, and the Media (1995).



D. EEO enforcement is justified  
to promote minority ownership

1. Is there a rational basis for promoting  
inter-station diversity of viewpoints?

The Commission has recognized three statutory bases for EEO regulation in support of its minority ownership policies: Section 309(j),<sup>292/</sup> Section 309,<sup>293/</sup> and Section 257(b).<sup>294/</sup> In each

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<sup>292/</sup> NPRM, 13 FCC Rcd at 23017-19 ¶¶36-38 (tracing its authority to promote minority ownership through EEO regulation to the competitive bidding provision of the Telecommunications Act, codified at 47 U.S.C. §309(j) (1996).)

<sup>293/</sup> See also Streamlining of Mass Media Applications, Rules and Processes, and Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (Report and Order), 13 FCC Rcd 23056, 23098 ¶102 (1998) (noting, in requiring minority and female ownership data, that Section 257(b) directs the Commission to promote "diversity of media voices", and observing that "[t]o the extent that a lack of employment opportunities in the broadcast industry deprives minorities of employment or management experience and thereby erects barriers to entry into the industry, our action today will help us to fulfill our mandate under Section 257 to identify and eliminate those barriers and foster a diversity of media voices"); Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (NOI), 11 FCC Rcd 6280, 6306 ¶38 (1996) ("Market Entry Barriers") ("[r]ace or gender discrimination in employment may impede participation and advancement in the communications industry. Employment provides business knowledge, judgment, technical expertise, and entrepreneurial acumen, and other experience that is valuable in attaining ownership positions.")

<sup>294/</sup> See Streamlining, 11 FCC Rcd at 5167 ¶3 ("employment discrimination in the broadcast industry inhibits our efforts to diversify media ownership by impeding opportunities for minorities and women to learn the operating and management skills necessary to become media owners and entrepreneurs") (fn. omitted); Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 2788, 2790 n. 22 (1995) ("it is often the case in the mass media industry that station or system owners were once employees of that facility or of another facility. Thus, increasing minority employment in the mass media may ultimately contribute to increased minority ownership"); EEO Forfeitures, 9 FCC Rcd at 929-30 ¶3 ("increased employment opportunities are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership"); Amending Broadcast EEO and FCC Form 395, FCC 80-328 (June 25, 1980) at ¶13 (the "EEO requirements and policies favor....minority ownership so that programming will reflect the needs and interests of minority groups.")

instance, the Commission has recognized that EEO enables minorities to gain entry and rise to management and ultimately ownership positions. As Commissioner Ness has stated,

[t]he modest advances in broadcast employment that have been made by minorities and women deserve recognition. However, I find that the overall results are inadequate, particularly in top positions such as group manager, general manager, station manager, and sales manager. One of my goals is to ensure that there are meaningful opportunities for minorities and women not only to be hired, but also to rise to the top management positions at communications companies. These promotional opportunities are essential to provide experience and to position minorities and women for ownership. Experienced management is a critical component to attract media financing.

Implementation of the Commission's Equal Employment Opportunity Rules (Report), 9 FCC Rcd 6276, 6327 (1994) (Separate Statement of Commissioner Susan Ness). Congress also understands the symbiotic relationship between EEO and minority ownership.<sup>295/</sup> This symbiotic relationship has three components.

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<sup>295/</sup> EEO requirements are "particularly important in the mass media area where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups and to assure that there will be a sufficient number of minorities and women with professional and management experience who will be able to take advantage of ownership opportunities." H.R. Rep. No. 934, 98th Cong., 2d Sess. 4723 (1984).

First, minority owners are a point of entry and a sanctuary assuring fair treatment for minority broadcast professionals.<sup>296/</sup>

Second, equal opportunities provided by nonminority broadcasters help minorities obtain the skills needed to become owners.<sup>297/</sup> A 1990 survey of twenty Black broadcast station owners by Akosua Barthwell Evans, published in the Yale Law and Policy Review, found that 50% of the owners had prior broadcasting experience before they purchased their first station; 25% percent had more than fifteen years of experience and 25% had been general managers before acquiring their first station.<sup>298/</sup>

Third, the availability of a wider pool of well trained minorities enables minority owners to find a wide range of

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<sup>296/</sup> The Lutheran Church panel appeared to acknowledge that the FCC is justified in promoting "inter-station" diversity", that is, a variety of different types of stations, including minority owned stations that might be more likely to be programmed for minorities. Id., 141 F.3d at 355 (stating, in dictum, that "[i]t is at least understandable why the Commission would seek station to station differences[.]") Apparently, the Court would have perceived this as an important governmental interest -- sufficient to meet the intermediate scrutiny test and thus easily sufficient to meet rational basis scrutiny. Id. While a policy aimed at enabling minority owners to have access to a pool of trained minority professionals should not be the primary purpose of an EEO policy, it is certainly an important purpose.

<sup>297/</sup> In Edens Broadcasting, Inc., 8 FCC Rcd 4905, 4908 (1993) (Statement of Commissioner Andrew C. Barrett, Concurring in Part and Dissenting in Part), Commissioner Barrett questioned "how our minority ownership policies can continue to have some impact, where minorities constantly are penalized for a lack of broadcast or cable management level experience (fn. omitted). If the FCC does not continue efforts to aggressively enforce its EEO rules, minority employment and minority ownership in the media industry will continue to suffer."

<sup>298/</sup> A. Evans, "Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry," 8 Yale Law and Policy Review 380, 391-92 (1990) ("Evans").

especially well motivated talent.<sup>299/</sup> Minority owned operating on the scale of BET, American Urban Radio Network, Radio One or Spanish Broadcasting System would not exist today without the availability of a pool of minority talent who secured a chance to enter the industry through the original EEO Rule.

EEO regulations do not aid minority ownership for its own sake. Minority ownership serves the public interest because

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<sup>299/</sup> See D. Honig, "Relationships among EEO, Program Service, and Minority Ownership in Broadcast Regulation," in Proceedings of the Tenth Annual Telecommunications Policy Research Conference 85, 87-88 (1983) ("Honig"). This study found, inter alia, that 72% of management employees at Black owned stations were Black but 38% of management employees at White owned stations were Black. The study controlled for format; all of the stations in the study had Black (urban) formats. See also P. Gold, "Public Interest Programming Service to Minority Community by Minority-Oriented Commercial Radio Stations (1983) ("Gold") at 14 (published paper in the NAB Library; discussed in Evans, 8 Yale Law and Policy Review at 407) (finding that 82% of the Black owned, Black formatted stations had Black general managers compared to 27% of the White owned, Black formatted stations, and that nearly 74% of the Black owned stations had more than 75% Black employees compared to fewer than 34% of the White owned, Black formatted stations); F. Gutierrez and J. Schement, Spanish Language Radio in the Southwestern United States, Austin: Center for Mexican American Studies, University of Texas (1979), discussed in M. Fife, "Promoting Racial Diversity in U.S. Broadcasting," in 9 Media, Culture and Society 481, 495 and 501 n. 16 (1987) (studying Hispanic and non-Hispanic owners of Spanish formatted stations and reaching conclusions similar to those in Honig and Gold).

minority owners tend to provide access and exposure to otherwise underexposed minority viewpoints.<sup>300/</sup>

**2. Are other tools available to the FCC to promote inter-station diversity?**

As a consequence of the loss of the tax certificate policy and the growth of local superduopolies, minority owners are being

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<sup>300/</sup> A recent study by a professor of economics and a professor of law and social science at CalTech demonstrated empirically that there is a direct relationship between the ethnicity of the owner of a broadcast station and the choices of programs aired. In other words, racial differences among owners of stations are likely to result in differences in types of broadcast programming air. The study showed convincingly that where the owner of a broadcast owner is a racial minority, there will be an increase in or greater likelihood of programming geared to audiences of the same race or ethnic status as the owner. J. Dubin & M. Spitzer, "Testing Minority Preferences in Broadcasting", 68 S. Cal. L. Rev. 841 (May, 1995). Earlier scholarly research reported similar findings. See J. Jeter, A Comparative Analysis of the Programming Practices of Black-owned and White-owned Black-Oriented Radio Stations (1981) at 130, 139; M. Fife, Impact of Minority Ownership on Minority Images in Local TV News (1986); M. Fife, Impact of Minority Ownership on Broadcast News Content: A Multi-Market Study (1986). Summarizing this research, Justice Brennan's majority opinion in Metro Broadcasting concluded:

[e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities. "[M]inority ownership does appear to have specific impact on the presentation of minority images in local news," inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies [emphasis supplied; footnotes citing sources omitted].

Id., 497 U.S. at 580-82.

forced out of the industry at warp speed.<sup>301/</sup> Few new ones are gaining a foothold.

The tax certificate policy, which accounted for 2/3 of minority owned stations, was repealed in April, 1995. According to NTIA, minorities own only 2.9% of all broadcast stations.<sup>302/</sup> MMTC estimates that these stations comprise less than half of one percent of industry asset value.

A race-neutral EEO policy could in theory result in the full diversification of broadcast employment. The same cannot be said for minority ownership. To compete in the ownership arena, minorities need, among many other things, (1) broadcast experience and access to others with broadcast experience; (2) access to capital;<sup>303/</sup> (3) an end to discrimination by advertisers and ratings services, and (4) opportunities to bid on and purchase stations or build them from scratch. EEO regulation can help address minority owners' labor needs, but not their capital and opportunity needs. Thus, additional steps beyond enforcing EEO regulations will be needed to foster minority ownership, and those steps almost by definition will not be race-neutral. Since

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<sup>301/</sup> See generally Ofori.

<sup>302/</sup> NTIA, "Minority Commercial Broadcast Ownership in the United States" (August, 1998), Summary.

<sup>303/</sup> Discrimination in access to capital is widespread. See Minority Markets ALERT, January, 1999 (reporting findings of the National Bureau of Economic Research that that Blacks are twice as likely as Whites who have comparable creditworthiness to be denied a small business loan, with Blacks having a 50% rejection rate compared to similarly qualified Whites' 25% rejection rate). See also M. Selz, "Race-Linked Gap Is Wide in Business-Loan Rejections," Wall Street Journal, May 6, 1996, at B-2 (reporting that banks in Denver redenned 51% of Black business loan applicants while rejecting only 15% of White applicants).

Adarand, no one has conceptualized an effective, race-neutral means of promoting minority access to capital and opportunity.<sup>304/</sup>

Consequently, it will be necessary to undertake an Adarand study to document the need for race-neutral, remedial minority ownership initiatives. Minority ownership initiatives will need to be justified only to remedy past discrimination, since it appears unlikely that the courts now sitting would consider program diversity to be a compelling governmental interest. Before a court can approve a race-sensitive program, it will have to assure itself that an agency has first attempted race-neutral alternatives and found them insufficient to satisfy the agency's remedial purpose.<sup>305/</sup>

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<sup>304/</sup> Recasting the tax certificate program to foster "small business", for example, would probably have little impact on minorities, as the C-Block auctions proved. Unfortunately, most White-owned businesses will finance their friends, and their friends' children, more readily than they will finance minorities. Race-neutral initiatives intended to benefit those who suffer disadvantage because of race usually confer windfall benefits on undeserving Whites, and their impact on those genuinely in need is usually rather dilute. As a means of promoting diversity, a "small business" paradigm is particularly inapt because there is no evidence at all that simply being "small" is likely to foster the broadcast of any particular viewpoint, or even to result in more news, public affairs, or other nonentertainment programming. Owing to economies of scale, the reverse may well be true.

<sup>305/</sup> Adarand, 515 U.S. at 224; Croson, 488 U.S. at 469-70.

Consequently, it is profoundly important for the FCC to design any new EEO regulations so that they are (among other things) remedial, and to include in the evaluation criteria for the new EEO regulations the extent to which they have aided minority ownership. The EEO regulations should stand as a monument to the Commission's desire to leave no stone unturned in seeking race-neutral steps aimed at remedying its own licensing policies' adverse impact on minority ownership.306/

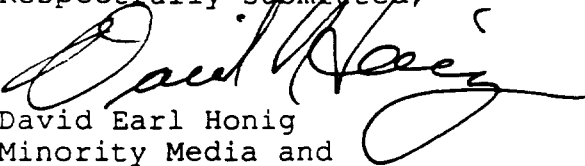
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306/ This concludes Volume I of our Comments. Volume II will focus on the mechanics of an effective EEO enforcement program; that volume will also contain concluding remarks. Volume III will contain statements of expert witnesses, and Volume IV will analyze those witness statements. Volumes II through IV will be filed shortly.



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